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Punitive Justice in the Malaysian Criminal Law: Balancing The Rights of Offenders with Those of the Victims

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ABSTRACT

It is undeniable that there has been a rise in the crime index cases in Malaysia. Statistics recorded showed that there were 984,789 criminal cases through the years 2005 until 2009, i.e. the average of 16413 cases per month and 547 cases per day. It can be interpreted from the statistics that if the crime rate is high, the number of the aggrieved parties who are affected by those criminal acts is also large. This is our main concern. The question arises as to what extent the punitive justice manages to resolve this problem. This paper discusses this scenario in the Malaysian context. It examines the extent of which the existing law guarantees the rights of the offenders and those of the victims. It clarifies whether they get fair and just treatment in the present criminal justice system.

Key words: Criminal Justice, Sentencing, Rights of victim.

Introduction

Punitive justice as exercised in Malaysia today is retributive and rehabilitative in nature. It is a theory of justice that considers punishment as an acceptable response to crime. Many parts of this world use the same theory in their legal documentation. The concept reflects “an eye for an eye” and let the punishment fit the crime. Any criminal act that is committed by the accused is considered as a breach of state’s right and it is not a wrong against the victim. Some argue that the role of criminal justice system should reflect both the offender and the victim involved. The current system’s channel of communication is criminal-centric and it serves as the medium to punish and rehabilitate the offender. It neglects its role to create self consciousness on responsibility and accountability towards the damage that has been done. In addition, as too much emphasis is given with respect to the rights of offenders, the authority tends to ‘invest’ more on them, without any thought of reaping any benefit from the amount expended.

Thus, this paper discusses the question of balancing the rights of offenders with those of the victims within the existing legal framework in Malaysia. It explains the extent of which the legal protection is given to the offenders and the victims and suggests improvement to the system so that it is responsive and receptive to both parties.

Rights of Offenders:

Rights of offenders, which range from the right of counsel and a public trial to the right of appeal, are guaranteed by the Constitution of Malaysia, international instrument as well as several other legislative enactments including the Criminal Procedure Code.

Article 5 of the Federal Constitution provides that no person shall be arrested except according to procedure established by law and that such person shall be informed of the reason for his arrest. It further provides that any person held in custody or detained shall be brought before the judge of the nearest competent Court and shall not be further held in custody except upon and in terms of the order of such judge.

In the area of criminal laws and procedure, Article 7 provides the following protections:

- No person shall be punished for an act or omission which was not punishable by law when it was done or made.
- No person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.
- A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where a retrial is ordered by a court.

Article 11 sets out that every person shall be presumed innocent until he is proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

The Criminal Procedure Code also contains several safeguards accorded to the accused commencing from his arrest to the conclusion of the trial. In this process, the law also contains several provisions that would ensure a fair trial for the accused.

In terms of punishment, Article 5 of the Universal Declaration of Human Rights provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The UN Standard Minimum Rules for Protection of Prisoners, known as the (Standard Minimum Rules), adopted by the UN Social Economic Council in 1957, provide guidelines for treatment of prisoners and confirm the tenet that while being imprisoned the prisoners do retain their fundamental rights. On this account, UN Declaration of Basic Principles for the Treatment of Prisoners 1990 agreed that prisoners must be treated with the respect due to their inherent dignity and value as human beings and no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Criminal justice systems around the world vary, but many include the following rights for offenders:

- The right not to be subject to arbitrary arrest, detention, search or seizure;
- The right to counsel;
- The presumption of innocence;
- The standard of proof (beyond reasonable doubt);
- The right to a public trial by an independent court;
- The right to test the prosecution evidence (e.g., to cross-examine witnesses);
- The right to give and call evidence; and
- The right to appeal.

Victims of Crime and Their Rights:

Victims are persons who individually or collectively, have suffered harm, which include physical or mental injury, emotional suffering or economic loss or substantial impairment of fundamental rights through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power. The term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm while intervening to assist victims in distress or to prevent victimization.

Victims' rights are cited in one international instrument i.e. the UN Declaration supporting justice for the victims of crime and abuse of power, which was adopted by the General Assembly in 1985. In the Declaration, nations agreed to draw up action plans to help victims gain better access to legal proceedings, fair treatment, restitution for damages and general assistance in legal proceedings.

Access to Justice and Fair Treatment:

Victims deserve to be treated with compassion and respect for their dignity. They should have access to the mechanisms of justice and should have prompt redress as provided for by national legislation, for the harm they have suffered.

States should create judicial and administrative mechanisms to enable victims to get redress through formal and informal procedures which are fair, expeditious, inexpensive and accessible. Victims should be informed of their rights in seeking redress of their grievances availing such judicial and administrative mechanisms.

The Right to Restitution:

Offenders or third parties responsible for their conduct should make fair restitution to victims, their families or dependants. Restitution should include the return of property, or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of victimization, the provision of services and restoration of rights.

Restitution should be used to provide a way of offsetting some of the harm done to the victim, and also to provide a socially constructive way for the offender to be held accountable while offering maximum opportunity for rehabilitation. Restitution attempts to establish a relationship between the victim and the offender in an effort to raise the offender's sense of responsibility to the victims and to society. The idea of restitution also attempts to advance a sense of personal accountability to the victim. Some jurisdictions utilize mediation programmes.

Restitution can be implemented in a number of ways at various points throughout the criminal justice process: as a condition of probation, as a sanction in itself, or as an additional penalty. Although restitution is often imposed in a mandatory fashion, it may be entered into voluntarily by the offenders as well.

Attitude of the judiciary towards restitution needs to get changed because in many nations, the judiciary thinks that the punishment of the offender alone meets the ends of justice.

The Right to Compensation:

When compensation is not fully available from the offender or other sources, States should come forward to provide financial compensation to:

- a) Victims who have suffered significant bodily injury or impairment of physical or mental health as a result of serious crimes.
- b) The family, particularly the dependants of persons who have died or become physically or mentally incapacitated as a consequence of such victimization.

Many people would argue that no amount of money would be adequate to compensate the victim or his family for the victim's loss. In reality, in murder case for instance, the victim will no longer earn a living means over his expected future lifetimes. Hundreds or thousands and perhaps millions of dollars in earnings will have been lost. However, the loss to the victim and his family was considerably more than this amount. Any assessment of their loss must account for the tremendous pain, suffering, lost quality of life and the grief they have suffered.

The Right to Assistance:

Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means. Information on the availability of health and social services and other appropriate assistance besides access to such assistance should be provided to crime victims.

All relevant agencies such as police, justice, health, social service etc. should receive training to sensitize them to the needs of victims, and guidelines to ensure prompt aid. Care and special attention should be given to the special needs of victims on the basis of the victimization suffered, while providing services and assistance to victims.

Balancing the Rights of Offenders and Those of Victims in the Malaysian Criminal Justice System:

Article 8(1) of the Federal Constitution of Malaysia guarantees that:

All persons are equal before the law and entitled to equal protection of the law.

The word "persons" in the above may refer to any person including the victim and the offender. Thus, by virtue of this Article, both the offenders and the victims are also guaranteed to get equal rights and treatment before the law. Nevertheless, the status of victim is neither expressly stated in the Federal Constitution nor clearly defined in any legal provisions in Malaysia.

In our system, the criminal justice process involving the arrest, trial, conviction and punishment of the accused have little relevance to the victim. Action is taken in the name of the State and not on behalf of the victim. There are no enforceable provisions in the Constitution that are designed to effectively protect a victim of crime. In this background, when one embarks on balancing the rights of the offenders with the rights of the victim in the administration of justice, one could see an imbalance with the scales tilted more in favour of the offender than the victim.

The punitive justice as exercised in Malaysia today focuses more on the punishment that is to be inflicted on the offender. It is a theory of justice that considers punishment as an acceptable response to crime. In many parts of this world, the criminal justice system used to be depicted as a battle between a suspected criminal on the one hand and the state - representing respectable society - on the other.

Generally, the offender has no say to settle the case amicably with the aggrieved party once he is arrested. Similarly, the victim has no say either to halt the proceeding or to negotiate with the convict. Criminal cases are not handled by the parties involved but it is between the accused and the prosecutor (the state). In some cases which rely on a report made by the victim such as the crime of sexual harassment or defamation, the victim will have no chance to reconcile with the offender unless he revokes the police report. In that case, he might lose his right in getting compensation that he possibly will get if the case is settled amicably.

It should be noted that when a crime is committed, it is the victim who is harmed, not the state; instead of the offender owing a 'debt to society' which must be expunged by experiencing some form of state-imposed punishment, the offender owes a specific debt to the victim which can only be repaid by making good the damage caused. The criminal proceeding, however, seems to neglect matter. When the criminal act infringes the right of individual, for instance, voluntarily causing hurt the convict will be sentenced to imprisonment or fine or both. It is clear that imprisonment is a kind of retribution whilst the fine goes to the government's revenue. The question arises as to what is the compensation available to the victim who has suffered physical pain, fear, trauma, loss of income, medical cost etc. Similarly, in the crimes against property such as theft of motor vehicle whereby the punishment provided for is imprisonment or/and fine. The victim in this case, of course, incurs

losses in terms of using the vehicle, the cost to repair it etc. The question arises as to whether the victim has the right to claim restitution from the offender besides the return of property.

It is true that the victim can take a civil suit against the convict to claim compensation but should there be any remedy in terms of monetary compensation from the criminal law itself?

It is a known fact that tort and criminal law are two different areas in the fields of law. As asserted by S.A Alsagoff, it is very surprising to see the law compensate the action in tort which is caused by negligence while ignoring compensation in crime whereby most of it is committed intentionally. Crime is considered a wrong against society while tort is a wrong to the individual. While the prosecution part is handled by the public prosecutor in criminal cases, in tort it would lie with the plaintiff whether or not to bring an action i.e. involving the litigants i.e.; plaintiff and defendants. The law of tort is defined as a wrongful conduct done by one human being to another human being, whether deliberately, intentionally or by way of negligence such as battery, invasion to privacy or intentional infliction on mental suffering. All these kinds of offences whether criminal or tort are interrelated in having common results such as physical injury, emotional or psychological injury, pecuniary loss and social stigma.

The current system's channel of communication is criminal-centric and it serves as the medium to punish and rehabilitate the criminal. At the same time, the criminal justice system somehow forgets about its role to create self consciousness on responsibility and accountability towards the damage that has been done. In addition, as too much emphasis is given with respect to the rights of prisoners, the authority tends to 'invest' more on them, without any thought of reaping any benefit from the amount expended. Therefore, the criminal justice system should be responsive and receptive to both parties, i.e. the criminal and the victim. At the same time, the criminal should be responsive to the damage that they have caused, which includes all the different facets of damages, from bodily harm to financial and emotional damages. This is where the line of responsibility will come in.

Imprisonment will only create retributive and punitive sanction in nature. It fails to restore the damage done to the victim. Roughly calculated, our government spends more than million a day for criminals. If this continues, it indicates the concept of social responsibility is lacking. It is therefore submitted that the punishment should not merely be focusing on imprisonment per se. Other avenues to compensate the victims in terms of suffering and cost incurred need to be taken into consideration.

Although there are many victimization cases in Malaysia, still the status of victim is not expressly stated in the Federal Constitution. Even the definition on victim cannot be tracked in any legal provisions in Malaysia. Furthermore, despite the existence of statutory measures on victim protection like the Criminal Procedure Code (CPC), and the Domestic Violence Act 1994 (DVA), collectively these statutes provide inadequate financial compensation. Generally, they only provide physical protection for victims, but not emotional, financial and psychological protection. Besides, there is no attractive system for reimbursing transportation, allowances, and accommodation expenses for victims navigating through the criminal justice systems.

In Malaysia, more specific protection for the rights of victims is provided for victims of domestic violence and child abuse. However, there is no such specific legislation that protects the rights of victims of other crimes. It looks as if the victim of other crimes such as rape, murder or robbery etc is neglected in the criminal justice system.

New Development In Malaysia Towards A Better Criminal Justice System:

Currently, there are few amendment made to the Criminal Procedure Code to improve the rights of offenders and uplift those of crime victims. The principal changes are as follows;

- (a) Pre-Trial Conference - section 172A
- (b) Case management - section 172B
- (c) Plea Bargaining - section 172C
- (d) Victim's Impact Statement - sections 173(m)(ii) and 183A
- (e) Proof by written Statement - section 402B
- (f) Proof by Admission - section 402C
- (g) Lesser Restriction for Alibi - section 402A
- (h) Compensation to Victim - section 426(1A)

The above amendment benefits the offenders as well as the victims. Plea bargaining for instance, before the amendment, the courts are judicially prohibited to participate in plea bargaining. They are not bound by the private bargaining between the prosecution and the defence. Plea bargaining is a negotiation between the defendant and his attorney on one side and the prosecutor on the other, in which the defendant agrees to plead "guilty" or "no contest" to some crimes, in return for reduction of the severity of the charges, dismissal of some of the charges, the prosecutor's willingness to recommend a particular sentence, or some other benefit to the

defendant. Sometimes, one element of the bargain is that the defendant reveals information such as location of stolen goods, names of others participating in the crime, or admission of other crimes. Reasons for the bargaining include a desire to cut down on the number of trials thus reduce backlogs, danger to the defendant of a long term in prison if convicted after trial, and the ability to get information on criminal activity from the defendant besides savings of public funds and time.

The interesting part of the system newly introduced is the concept of listening to the victim. The victim would be given a chance to speak and express their grievances through a systematic mechanism used by the court. Previously, the victim or his family was not given the opportunity to participate in the sentencing process. The amendment (s.183A) allows Victim Impact Statement (VIS) i.e. a statement of right given to the victims to appear in court and participate in the criminal justice system. They have been given a right to make a statement on the impact of the offence on the victim or the family such as trauma or harm, economic loss or damages suffered by them. This statement will be taken into consideration in passing the judgment.

Another significant remark is, this new provision of s.426 (1A) requires the Court, if the Public Prosecutor applies for, to order the convict (or the parent or guardian, in a case of a child) to pay monetary compensation to the victim or the deceased victim's family. In assessing the quantum of compensation, the Court is empowered to hold an inquiry, and specific particulars must be considered including the nature of the offence, the injury sustained by the victim, expenses and losses (including loss of income) suffered by the victim, and the convict's financial capability to meet the compensation.

Conclusion:

From the above discussion, it can be concluded that criminal justice system is meant to ensure that an innocent suspect is not unfairly prosecuted or convicted. On the other hand, it is designed to strike a balance, in that the interest of the victim in having the perpetrator prosecuted and punished is protected. The existing legislation in Malaysia does have several provisions to protect the rights of the offenders and those of crime victims. However, these provisions are insufficient and limited. Most of the victim-related legislations in Malaysia focus on the physical protection of victims. Nevertheless, emotional and psychological protections as well as financial compensation are not sufficiently provided.

Any criminal act that is committed by the accused is considered as a breach of state's right and it is not a wrong against the victim. Consequently, the victim has little input in the judgment of the court and seems to have little knowledge or comprehension of what is happening in his case. Victims are left only as witnesses. They rarely have a voice in the process. The aggrieved party is not given any option to reconcile with the offender and claim his right against him. If any person commits any crime against the Penal Code, it is a crime that involves the state's right. Therefore, the victim cannot interfere in claiming his right directly from the offender.

It should be noted that the court still has the discretion to impose punishment on the offender, where appropriate, if the public interest necessitates it. Likewise, if the offender is convicted for committing a crime that infringes the property or integrity of the victim such as theft or defamation, he should be responsible for the loss incurred by the victim. If he is sentenced with fines, the payment should not go to the government but to the victim instead. However, if the crime infringes the right of the public, the court may consider the plea of mitigation.

It is high time for the authority concerned incorporated restorative justice as an alternative to punitive justice in the system. Restorative justice is a new movement in the fields of victimology and criminology. It is a process through which remorseful offenders accept responsibility for their misconduct to those injured and to the community that, in response allows the reintegration of the offender into the community. The emphasis is on restoration: restoration of the offender in terms of his or her self-respect, restoration of the relationship between offender and victims, as well as restoration of both offenders and victims within the community.

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